BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: Katelyn S. Claimant, vs. Inland Regional Center. Service Agency.	OAH No. 2011050920

DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California on August 17, September 27, and October 27, 2011.

Joie Montana, Paralegal/Advocate, Tiffany Law Group, P.C. represented Katelyn S., Claimant.

Judith A. Enright, Esq, Enright & Ocheltree LLP, represented Inland Regional Center, the Service Agency.

The matter was submitted on December 20, 2011.[1]

[1] The record remained open for receipt of written closing argument.

Claimant's Closing Brief was filed on November 16, 2011 (Exhibit A-31). The Service Agency's Closing Brief was filed on December 14, 2011 (Exhibit 40). Claimant's Final Closing Brief was filed on December 20, 2011 (Exhibit A-32). The matter was submitted on December 20, 2011.

ISSUE

Whether Claimant is eligible to receive regional center services on the basis of Autistic Disorder?

FACTUAL FINDINGS

1. Katelyn S. (Claimant) is a female, who was seven years old on the date that she applied to receive services from the Inland Regional Center (Service Agency) on the basis of Autism and Epilepsy. The Service Agency performed a social assessment, a medical evaluation and psychological assessments and obtained additional records from Renee S., her mother. A Service Agency interdisciplinary diagnostic team considered the data obtained and concluded that Claimant was not eligible to receive regional center services because she does not have a substantial handicapping condition as a result of a developmental disability. Claimant filed a timely Fair Hearing Request.

2. In 2004, Claimant applied for regional center services through the Early Start Program. The Service Agency closed her case for lack of information.

In 2005, the Service Agency received additional documentation for review from Renee S., Claimant's mother. There is a dispute regarding whether the Service Agency authorized Claimant to receive services. However, according to the testimonial and documentary evidence, Claimant's file was inactivated until after she saw a neurologist and had an electroencephalography (EEG). There is no evidence that it was reactivated and insufficient evidence to establish that she was denied eligibility at that time.

In 2008 the Service Agency reconsidered Claimant's eligibility for regional center services. By letter, dated October 2, 2008, the Service Agency notified Claimant that she met the "guidelines for individuals with Autistic Spectrum Disorders" but did not satisfy the criteria for eligibility on the basis of Autism.

3. Claimant lives in the family home with her mother and her younger sister. She has no contact with her biological father.

4. Seizure disorder is suspected and has not been ruled out. Renee S. reported that, before she was three years of age, Claimant began having staring seizures and that she had at least three seizures a day.

5. Claimant is resistant to self-care and would prefer no bathing, grooming, teeth brushing or hygiene. Each task requires repetitive prompts, hand-over-hand assistance, at times, and supervision is needed for Claimant's compliance. If one-to-one is not provided for these tasks, she may tantrum or may exhibit avoidance behavior.

At times, she has wetting accidents and is incontinent for bowel movements.

She uses a spoon and fork but prefers to finger feed. She gets herself a drink, a simple uncooked snack or a simple sandwich, albeit with repetitive prompts. Occasionally, Claimant helps her mother with food preparation but has poor awareness of her body in three-dimensional space. She does not help with chores.

Claimant has poor safety awareness and will bolt from the home with little fear. She has poor boundary awareness. She knows her address and telephone number.

6. Claimant has severe social deficits.

She was not cuddly as a baby and did not like being held. She was aloof and distant and preferred being alone. Sometimes, she would cling to her mother.

Claimant does not initiate interaction with others. She participates in group projects and activities with difficulty. She displays unacceptable social behaviors constantly at home and in the community. During the visit by the Service Agency's case manager, Claimant spread her legs inappropriately while sitting in a chair, made spit bubbles, passed gas and took off her shoes. Claimant has a hard time forming and maintaining friendships in all settings. She does not play with children and prefers to be with adults. She participates in community outings for errands and entertainment with her family at least once a week. She is physically aggressive with peers, adults and staff. She intentionally destroys school and daycare center property. Claimant displays emotional outbursts at least two to three times a day and usually requires intervention.

7. Renee S. reports that Claimant's speech was somewhat delayed. She communicates by using speech, pointing, shaking her head or leading by hand. She understands simple phrases and instructions.

8. Claimant is enrolled in an integrated public school with fully integrated classes where she has contact with non-disabled students. She is in a regular education second grade class five days a week and has a one-to-one aide. She receives occupational therapy through the public school district and qualifies to receive special education on the basis of autistic-like behavior. Renee S. testified that the last IEP, dated March 11, 2011, is in dispute; the school district seeks to change the bases of eligibility to other health impairment and emotional disturbance.

9. In the sensory area, Claimant alternates between liking certain sounds and being fearful of certain sounds or noises. At times, she seems to hear distant or soft sounds that others do not notice. She has staring spells and often does not look directly at things. Claimant likes looking at herself in mirrors, often avoids looking at people when they are talking to her and plays with light switches, turning them on and off. Additional sensory issues have included putting things in her mouth, lining up objects/toys, and chewing on things not intended for chewing or eating; she rubs her feet on items a lot and plays with objects with her feet. Claimant is sensitive to clothes. She does not like shoes and clothing, particularly restrictive clothing.

10. In order to qualify to receive regional center services on the basis of Autism, Claimant must satisfy the criteria for Autistic Disorder set forth in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition, Text Revision 2000 (DSM-IV-TR). Regarding Autistic Disorder, the DSM IV-TR states, in pertinent part:

> The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual. Autistic Disorder is sometimes referred to as *early infantile autism, childhood autism,* or *Kanner's autism*.

11. The DSM-IV-TR lists criteria that must be satisfied to make a diagnosis of Autistic Disorder, as follows:

A. A total of six (or more) items from (1), (2) and (3), with at least two from (1), and one each from (2) and (3):

(1) qualitative impairment in social interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction
(b) failure to develop peer relationships appropriate to developmental level
(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)
(d) lack of social or emotional reciprocity

(2) qualitative impairments in communication as manifested by at least one of the following:

(a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gestures or mime)
(b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
(c) stereotyped and repetitive use of language or idiosyncratic language
(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

(3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

(a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus.
(b) apparently inflexible adherence to specific, nonfunctional routines or rituals.
(c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
(d) persistent preoccupation with parts of objects

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in communication, or (3) symbolic or imaginative play.

C. The disturbance causes clinically significant impairment in social, occupational, or other important areas of functioning.

(Id. at p. 75)

12. Thomas F. Gross, Ph.D. (Dr. Gross) and Sandra Brooks, Ph.D. (Dr. Brooks) evaluated Claimant on behalf of the Service Agency; on behalf of Claimant, Betty Jo Freeman, Ph.D. (Dr. Freeman) evaluated Claimant. All three are psychologists licensed in the State of California. Following assessment, each psychologist issued a report. Doctors Brooks and Freeman testified as witnesses in this proceeding.

As part of the evaluation, each psychologist administered one or more diagnostic tests. Among other things, Dr. Gross recommended that Claimant be observed in the classroom setting; Dr. Freeman administered diagnostic tests that typically require completion by parent and teacher. Dr. Brooks was unable to observe Claimant in her classroom, and Dr. Freeman was unable to obtain forms completed by the teachers because of pending litigation between Claimant and the school district.

13. On November 16, 2010, Dr. Gross completed his evaluation when Claimant was seven years three months old.

His evaluation included: (1) review of the Confidential Evaluation Report from the Menifee Union School District, dated April 8, 2008, (2) administration of the Vineland Adaptive Behavior Scale (Vineland), Childhood Autism Rating Scale, 2nd Edition (CARS) and Wechsler Intelligence Scale for Children IV (WISC-IV), and (3) clinical interview. Thereafter, he issued a report.

14. When the Menifee Union School District completed its assessment in April 2008, Claimant was four years, nine months old. Dr. Gross made particular note of certain

tests administered and results obtained by Claimant during this evaluation. On the Autism Index of the Gilliam Autism Rating Scale – 2nd Edition (GARS), Claimant achieved a score of 106 (indicates very likely Claimant has Autism). On the CARS, she obtained a score of 35.5 (indicates mild to moderate Autism). On the Kaufman Assessment Battery for Children, Second Edition (KABC-II), on the Sequential/short term memory test, she achieved a standard score of 112 (average); on the Simultaneous/visual processing, a standard score of 116 (above average); and on the Fluid-Crystalized Index, a standard score of 104 (average).

15. The Vineland Adaptive Behavior Scale is a measure of the client's adaptive skills, i.e., how well she functions in daily situations. Claimant's mother provided the information for completing this scale.

Domain	Standard Score
Communications	85
Daily Living Skills	25
Socialization	36
Adaptive Behavior Scale	34

The WISC-IV is a measure of the client's cognitive ability. On this test, Claimant achieved the following scores:

Domain	Standard Score
Verbal Comprehension Index	110
Perceptual Reasoning Index	123
Work Memory Index	123
Full Scale IQ	123

Regarding her performance on the WISC-IV, Dr Gross reported:

> Overall, Katelyn's performance on this scale indicated above average intellectual ability. Particularly strong performance was noted on tasks involving visual conceptual and analogical reasoning (Picture Concepts, Matrix Reasoning); a task of short-term auditory memory (Digit Span) and a task of perceptual motor speed (Coding).

The CARS is used to assess the presence and severity of behaviors seen in children who experience Autism. Renee S. provided the information for completing this scale. Scores above 29.5 are indicative of Autism. Claimant obtained a score of 28.5.

16. Under Conclusions and Recommendations in his report, Dr. Gross stated:

> I will defer the diagnosis of Autistic Disorder pending a school observation and administration of the Autism Diagnostic Observation Schedule. Katelyn's performance on this occasion shows her to have above average intelligence.

> Although Katelyn exhibits some behavior seen in children with Autism, her overall presentation, for Autistic Disorder would be, I think, atypical. In fact, her behavior seems more consistent with a condition that Simon Baron-Cohen (1986) refers to as Multiple Complex Developmental Disorder.
>
> By report Katelyn does not engage peers in a cooperative or socially reciprocal manner. She tends to boss and direct other children, engaging them only in so much as they contribute to her own personal interests. She is reported to be largely ignorant of social rule and conduct. The latter was observed as she burst into song and dance while her mother, counselor, and I tried to have a conversation. (While performing, Katelyn positioned herself between those who were talking.) She was also noted to attempt to undress, i.e., stripping off her upper clothing. On the other hand, Katelyn seems to want and seeks attention and regard of others and, apparently, adults in particular. She makes and sustains good eye contact. She persistently sought and attempted to maintain my regard.
>
> Other than some repetitive popping sounds that Katelyn made with her mouth, I didn't notice any odd, repetitive or stereotyped body movements. It appears that little of this is observed in the home. Some compulsive object arrangement is noted and little imaginative/make-believe play is reported (some imaginative play was seen during this evaluation period in the form of her engaging in verbal dialog with a stuffed bear.)
>
> Unlike most children her age who experience Autistic Disorder, Katelyn is very verbal and talkative. She will initiate and sustain conversation. For the most part, when she uses language it is purposeful and appropriate to context; but, some of what she says seems to lack sensitivity to social rule and convention.
>
> Thus although Katelyn exhibits some features seen in children with Autism, she also exhibit tendencies that would seem to contraindicate the diagnosis. I believe a school observation and an additional assessment using ADOS[2] would help to clarify the diagnosis. . . .

17. Per Dr. Gross' recommendation, at the request of the Service Agency, Sandra Brooks, Ph.D. (Dr. Brooks) evaluated Claimant and attempted to make arrangements to observe Claimant at school. Her assessment included: (1) review of records (the Service Agency's exhibits[3]) and the neuropsychological evaluation performed by Mark McDonough

---

[2] Autism Diagnostic Observation Schedule - Module #3 (ADOS)

[3] Exhibit 1 through 38

Ph.D. (Dr. McDonough)[4], (2) administration of the Autism Diagnostic Observation Schedule – Module #3 (ADOS) and (3) clinical interview.

18. Dr. Brooks administered the ADOS on April 22, 2011, when Claimant was seven years and nine month of age.

19. In the Summary of her report, Dr. Brooks stated:

> Katelyn does not meet the diagnostic criteria for a diagnosis of Autistic Disorder. Katelyn uses language in a largely correct fashion. She is able to engage in reciprocal conversation, and spontaneously uses a variety of gestures. Katelyn made good eye contact with the examiner and demonstrated the appropriate use of facial expressions to communicate her ideas. She showed definite and appropriate pleasure in interacting with the examiner and demonstrated creativity and use of imagination in her creation of stories. Katelyn did not demonstrate excessive interest in or reference to unusual or highly specific topics or objects. No repetitive behaviors or body movements were observed. Katelyn demonstrated limited insight into social relationships and at times, she engaged in very immature and inappropriate behavior; nonetheless, however, Katelyn demonstrated a level of social interest and awareness that are inconsistent with a diagnosis of Autistic Disorder. Katelyn appears to have other behavioral and emotional issues that should be addressed psychotherapeutically.

Dr. Brooks attempted to observe Claimant in the classroom and obtain input from school staff. Because Renee S. was in litigation with the School District, Dr. Brooks was not able to do so. Dr. Brooks testified that based on her review of records and administration of the ADOS, she felt no need to do the school observation.

20. Dr. Freeman's first evaluation occurred on February 28, 2011, when Claimant was seven years and seven months old, and included: (1) review of records; (2) administration of diagnostic tests, including the ADOS-3, the Social Skills Improvement Scale (SSiS), the Social Responsiveness Scale (SRS) and the Behavior Rating Inventory of Executive Functioning (BRIEF) and (3) observation of Claimant and interview of her mother.

During her testimony, Dr. Freeman provided a list of the documents that she reviewed. It included most, if not all, of the exhibits in this proceeding as well as additional records.

21. The ADOS-3 is a measure of social communication and social behavior in children/adolescents with fluent speech and is used as a diagnostic indicator for Autism Spectrum Disorder. Items presented in the schedule provide a variety of opportunities for the

[4] Exhibit A-30

participant to engage in typical social interactions of exchange. Based on the participant's social interaction, scores are derived to determine whether there are diagnostic indications for Autistic Spectrum Disorder.

In her report and during her testimony, Dr. Freeman described her findings on the ADOS-3.

> In the area of language and communication, Katelyn did not exhibit echolalia. However, she does present with other speech abnormalities associated with autism. Katelyn injected no affect into her speech and her voice has a flat tone… Katelyn offered information to the examiner…. Katelyn ignored the examiner's conversational offers of information about herself and did not inquire about the examiner's thoughts, feelings, and experiences to build on presented discussions even after multiple probes…. Katelyn had some spontaneous elaboration of her own thoughts, but not of the examiner's. Katelyn used conventional, descriptive gestures during the demonstration task, but otherwise, her limited gestures were artificial and exaggerated.
>
> In the area of reciprocal social interaction, Katelyn did not use eye contact to modulate interactions with the examiner. Her facial interactions were extremely limited in range and inconsistently directed toward the examiner. Katelyn's language production was not coordinated with nonverbal means of communication (i.e., eye contact, gestures, vocation intonation) except during the demonstration task. Katelyn expressed some pleasure in her own actions, but not in interactions with the examiner. She showed some understanding of the meaning of friendship, but no other typical social relationships or her own role in them. She showed no insight into other feelings and emotions. The quality of Katelyn's social overtures tended to be related to her own interests. The quality of her social responses was awkward and she appeared unaware or unconcerned about the examiner's thoughts or feelings. Reciprocal social communication was limited, although Katelyn was very responsive to questions. The overall quality of the rapport was extremely one-sided and was comfortable at times but was not sustained.
>
> On related items, Katelyn exhibited limited imagination and creativity, as she did not initiate imaginative play and simply imitated the examiner's actions. No stereotyped or repetitive behaviors, self-injurious behavior or complex hand/body mannerisms were noted. However, Katelyn showed some excessive interest in her specific areas of interest. She also exhibited compulsive, ritualistic behavior; for example, when asked to name items in presented pictures, she ritualistically counted how many people were in the picture, constantly correcting herself to be precise and exact. Katelyn was very fidgety throughout the session and often became distracted particularly when questions related to her emotionality. Taken in the context of a complete psychological evaluation, results from this measure are conclusive for a diagnosis of Autism Spectrum Disorder.

The SSiS rating scales are designed to evaluate social skills, problem behavior and academic competence in children ages 3-18 years. Teacher, parent and student forms help provide a comprehensive picture across school, home and community settings. The SSiS includes the Social Skills scale and the Problem Behaviors scale. Based on parent report, Claimant obtained a Social Skills score of 42 (<1st percentile)[5] and a Problem Behavior score of 137 (97th percentile)[6]. Results on this scale are well below average in all areas for a child her age. Claimant's mother reported an elevated level of problem behaviors.

The SRS is designed to aid in diagnosis and treatment planning, and to measure the severity of autism spectrum symptoms as they occur in natural social settings in children 4 to 18 years of age. Completed by a parent or teacher, the SRS provides a clearer picture of a child's social impairments assessing five subscale areas: the social awareness subscale rates the child's ability to recognize or pickup social cues; social cognition looks at the child's ability to interpret social cues; and social motivation refers to the extent to which the child is motivated to engage in social interpersonal relationships including elements of social anxiety, inhibitions and avoidance; social communication subscale looks at the child's capacity for reciprocal social communication, which includes expressive social communication; the area of autistic mannerisms rates the level of stereotypical behaviors or highly restricted interests that are characteristic of Autism. The SRS is a quantitative measure of impairment across a wide range of severity.

Claimant's mother completed the scale. Regarding the SRS, Dr. Freeman reported:

> Results indicate clinically significant deficits in reciprocal social behavior that result in severe interference in Claimant's everyday social interactions. Based on the answers provided, Claimant has significant difficulty recognizing and interpreting social cues; she is not motivated and may avoid typical social relationships; she has significant deficits in social communication. Claimant also exhibits a high level of autistic mannerisms that clearly interfere with social interactions.

The BRIEF is designed to assess executive functioning in school-aged children both in the home and school environments, and to provide an understanding of everyday behavior associated with specific areas of self-regulated problem solving and social functioning. Normally parents and teachers complete the questionnaires. The BRIEF measures eight fundamental aspects of executive functioning in two domains. The Behavior Regulation Index reflects the child's ability to shift cognitive sets and modulate emotions and behavior by appropriate inhibitory control. The Metacognition Index represents the child's ability to

---

[5] Stated in the alternative, the score that Claimant received on this subtest indicates that her ability to use social skills in a natural environment is less than one percent of children her age.

[6] Stated in the alternative, the score that Claimant received on this subtest indicates that her behavior problems are greater than 97 percent of children her age.

initiate, plan, organize and sustain future-oriented problem solving in working memory. The Global Executive Composite is a summary measure of the child's overall functioning.

On the BRI, Claimant obtained a score of 80 (98th %); on the MI, a score of 73 (97th %) and on the GEC a score of 78 (98th %)

Regarding her findings on the BRIEF, Dr. Freeman stated:

> Ratings of Katelyn's executive functioning in the home setting, as described in everyday behavioral terms, reveal multiple areas of concern. Katelyn is able to control her emotions, keep information in mind for completing tasks, and organize her environment and materials at a level appropriate for her age. Specific concerns are noted, however, with Katelyn's ability to inhibit impulsive responses, adjust to changes in routine or task demands, initiate activities or problem solving strategies without prompts, plan and organize problem solving approaches and monitor her own behavior.

22. In her SUMMARY, Dr. Freeman stated, in pertinent part:

> Katelyn is a 7-year, 7-month-old girl brought in for diagnostic clarification and recommendations for intervention. Based on a review of her developmental history, *Autism Diagnostic Observation Schedule,* behavioral observations across settings, review of previous records, and parent's report, Katelyn meets criteria for a diagnosis for Autistic Disorder….
>
> Katelyn's early language development was significant for mild delays and deficits consistent with a diagnosis of autism. Mother also reported that Katelyn had social problems from early on. While Katelyn currently is fluent and has developed good receptive and expressive vocabulary, she exhibits significant deficits in social communication skills that continue to impede her access to the environment. In addition, review of records and parent interview indicate that Katelyn continues to evidence significant delays and deficits in social adaptation and independent functioning….
>
> Katelyn presents with social behavior both at home and in school that is very concerning and supports her diagnosis of an autism spectrum disorder….

In Dr. Freeman's opinion, Claimant meets the DSM-IV-TR criteria for Autistic Disorder.

23. On August 4, 2011, Dr. Freeman assessed Claimant a second time. In her report, Dr. Freeman noted that she saw Claimant in February 2011 and that she diagnosed Claimant with Autism Spectrum Disorder at that time. In order to ascertain Claimant's current skills and her ability to function independently in the community, Dr. Freeman observed Claimant with her mother in the community and interviewed her mother; in

addition, Dr. Freeman administered the Adaptive Behavior Assessment System – Second Edition (ABAS-II) to assess her adaptive behavior and related skills.

In her Supplemental Report, under SUMMARY, Dr. Freeman stated, in pertinent part:

> Katelyn is an 8-year-old child with a diagnosis of Autistic Disorder…. Updated assessment of Katelyn's adaptive functioning skills indicates that she is significantly impaired across all areas….
>
> Katelyn remains eligible for Regional Center services with her diagnosis of Autistic Disorder and substantial disability in the areas of Learning, Expressive and Receptive Language, Self-direction and Self-care….

24. Mark McDonough, Ph.D. (Dr. McDonough), a pediatric and adult neuropsychologist, completed a neuropsychological evaluation of Claimant to assess cognitive functioning and diagnostic considerations. He evaluated her on November 19, 2010, November 13, 2010, (school visitation) and December 2, 2010, and issued a report, dated January 24, 2011. His evaluation included (1) administration of the Conners' Rating Scale Revised (L – Parent Version), Conners' Rating Scale Revised (L – Teacher Version) (Awaiting Return) NEPSY, Wechsler Intelligence Scale for Children, 4th Edition (WISC-IV), Conners' Continuance Performance Test – CPT II, (2) review of records and (3) clinical interview.

In his report, Dr. McDonough provided a thorough analysis of (1) the records he reviewed, (2) her developmental history, (3) his behavioral observations, and (4) the diagnostic tests that he administered, the results obtained by Claimant and his interpretation of the results. Unlike any of the psychologists who evaluated Claimant for this proceeding, Dr. McDonough observed Claimant in the classroom and obtained forms completed by her teacher.

Under Summary Conclusions, Dr. McDonough reported, in pertinent part:

> …. Katelyn is a child of High Average to Superior intellectual functioning. When sensory overload is not an issue, and its untoward effect upon emotional functioning is contained, she can perform quite well.
>
> When these issues are not held in abeyance, her overstimulation results in pronounced and seemingly disproportionate reactions (disproportionate evident only from the outside observer, though reactions may be proportionate to the way that Katelyn perceives the environment.) These factors have contributed to her behavioral acting out, explosive episodes and untethered fight/flight reactivity….**The primary diagnosis is related to her Sensory Processing**, Integration and Modulation difficulties as the core theme.

Review of history supports this diagnostic consideration as well….

As with autism, Katelyn does show impairment in social interaction, and various other oddities of behavior that are somewhat consistent to symptoms of autistic disorder. This child **meets California Education Code** standards by definition of **Autistic-like characteristics** ….[7]

While not meeting the DSM-IV criteria, these symptoms do meet Ed Code standards as they have clearly affected her communication and social interaction and had a negative effect on her academic performance, with great variability seen over valid assessments.

Among his DSM-IV-TR diagnoses are pervasive developmental disorder (sensory/processing integration/modulation issues).

25. Based on the evaluations by Drs. Gross and Brooks, the Service Agency determined that Claimant does not have Autistic Disorder.

---

[7] In his report, Dr. McDonough distinguished a "pupil with autism" as defined in Education Code section 56846.2 (a) and the diagnostic criteria of DSM-IV-TR for Autistic Disorder.

Education Code section 568462 states:

(a) For purposes of this chapter, a "pupil with autism" is a pupil who exhibits autistic-like behaviors, including but not limited to, any of the following behaviors, or any combination thereof:

(1) An inability to use oral language for appropriate communication.
(2) A history of extreme withdrawal or of relating to people inappropriately, and continued impairment in social interaction from infancy through early childhood.
(3) An obsession to maintain sameness.
(4) Extreme preoccupation with objects, inappropriate use of objects, or both.
(5) Extreme resistance to controls.
(6) A display of peculiar motoric mannerisms and motility.
(7) Self-stimulating, ritualistic behavior.

(b) The definition of "pupil with autism" in subdivision (a) shall not apply for purposes of the determination of eligibility under the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code.

There is no dispute that Dr. Freeman has phenomenal credentials (i.e., education, training and experience). Among other things, she obtained her Ph.D. in 1969, completed a postdoctoral fellowship in the Department of Pediatrics in 1973, and has been licensed in California since 1976. She has received special training in the administration of the ADOS. For 30 years, she was the director of the Autism Early Childhood Program at UCLA; she developed the outpatient Autism evaluation program; she taught classes in the assessment of severely disabled children; she coauthored the definition of Autism in 1976 and was involved in the field trials for criteria for Autism for the DSM-IV; she was on the Department of Developmental Services panel that developed guidelines for regional centers regarding what constitutes assessment for children with Autism. In addition, she has done significant research, published and lectured on issues related to Autism and Mental Retardation. She has been a consultant to numerous school districts around the country and has been on numerous advisory boards. Dr. Freeman diagnosed Claimant with Autistic Disorder. She testified that since the DSM-IV, clinicians no longer distinguish Asperger's Disorder, Pervasive Development Disorder - Not Otherwise Specified (PDD-NOS) and Autism; all are diagnosed as Autism Spectrum Disorder. As such, she used the terms Autistic Disorder interchangeably with Autism Spectrum Disorder.

Drs. Brooks, Freeman and McDonough reviewed records that spanned three years. Over time, a variety of practitioners diagnosed a variety of conditions, including Pervasive Development Disorder; with the exception of Dr. Freeman, no other clinician diagnosed Claimant with Autistic Disorder. Dr. Freeman's diagnosis is inconsistent with not only Drs. Gross' and Brooks' comments/diagnoses, but also others who have evaluated Claimant in the past.

26. The Legislature did not intend to include Pervasive Developmental Disorders in the category of Autism. The Legislature has amended the Lanterman Act, including Welfare and Institutions Code Section 4512, numerous times since it was first enacted and has chosen not to change the list of qualifying conditions to include the other Pervasive Developmental Disorders, also known as "Autistic Spectrum Disorders." The Legislature is presumably aware of the distinction between Autism and other Autistic Spectrum Disorders, as demonstrated by its enactment in 2001 of Welfare and Institutions Code section 4643.3, which refers to "autism disorder and other autistic spectrum disorders.''[8] If the Legislature intended to add other Autistic Spectrum Disorders to the list of qualifying conditions under Welfare and Institutions Code Section 4512, subdivision (a), it could have done so. It is a cardinal rule of statutory construction that, where the Legislature has utilized a term of art or phrase in one place and excluded it in another, it should not be implied where excluded. (*Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564, 576.) Therefore, the word "autism" under Welfare and Institutions Code Section 4512, subdivision (a), refers only to autism and not the other Autistic Spectrum Disorders.

[8] Welfare and Institutions Code Section 4643.3, subdivision (a)(1) provides, in pertinent part, "[T]he department shall develop evaluation and diagnostic procedures for the diagnosis of autism disorder and other autistic spectrum disorders."

27. Insufficient evidence was offered to establish that Claimant has Autistic Disorder.

LEGAL CONCLUSIONS

1. Welfare and Institutions Code section 4512 states:

(a) "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

2. California Code of Regulations, title 17, section 54000, states in pertinent part:

(a) 'Developmental Disability' means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

3. California Code of Regulations, title 17, section 54001, states in pertinent part:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;
(B) Learning;
(C) Self-care;
(D) Mobility;
(E) Self-direction;
(F) Capacity for independent living;
(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parent . . . educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

4. As Claimant seeks eligibility, she bears the burden of proof by a preponderance of the evidence. (Evid. Code, §§ 500, 115.)

5. It was not established that Claimant has Autistic Disorder. Therefore, she is not eligible to receive regional center services. Absent such evidence, denial of Claimant's appeal was appropriate.

ORDER

The petition of Katelyn S. to receive services from the Inland Regional Center is denied.

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

DATED: February 24, 2012

_____

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings